GOVERNMENT ACCOUNTABILITY BOARD

TO: MEMBERS, GOVERNMENT ACCOUNTABILITY BOARD

FROM: Terry C. Anderson, Interim Director

RE: First Meeting

DATE: August 16, 2007

The first meeting of the Government Accountability Board is set for Thursday, August 23, 2007, beginning at 10:00 a.m., in the Legislative Council Conference Room, at One East Main Street. An agenda is enclosed for your reference.

Prior to the Call to Order, there are two essential organizational details. Each of you will be asked to sign an oath of office, required by statute for per diem and expense reimbursement. Following the oaths, a chair must be selected. The organizational legislation states that the "first nominated" member (Mr. Brennan) is to draw a name from all six and that member serves as chair until January 2008 when the process is repeated.

To provide you with an overview of the enabling legislation, I have asked the two Legislative Council attorneys that staffed the standing committee meetings to share their observations on the legislative intent for this board. In addition to these insights, Ron Sklansky, Legislative Council Senior Staff Attorney, will provide a quick review of the Open Meetings Law. Enclosed for your review are two relevant chapters from the Legislative Council *Legislator Briefing Book* that provide you with the highlights of open records and open meetings.

It appears that you are embarking on a new course. Legislative Council Intern Carlos Montoya has conducted a review of ethics and elections regulation and it appears that Wisconsin is the first to bring these under one board. A copy

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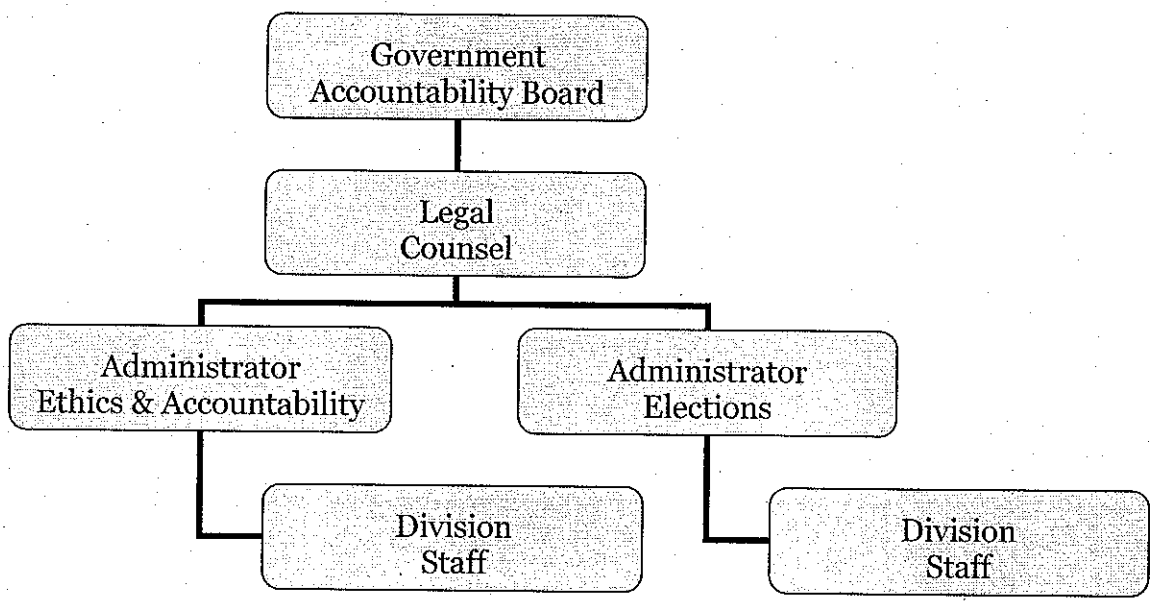
of Carlos' memo on this subject is enclosed and he will present a brief report to you next Thursday.

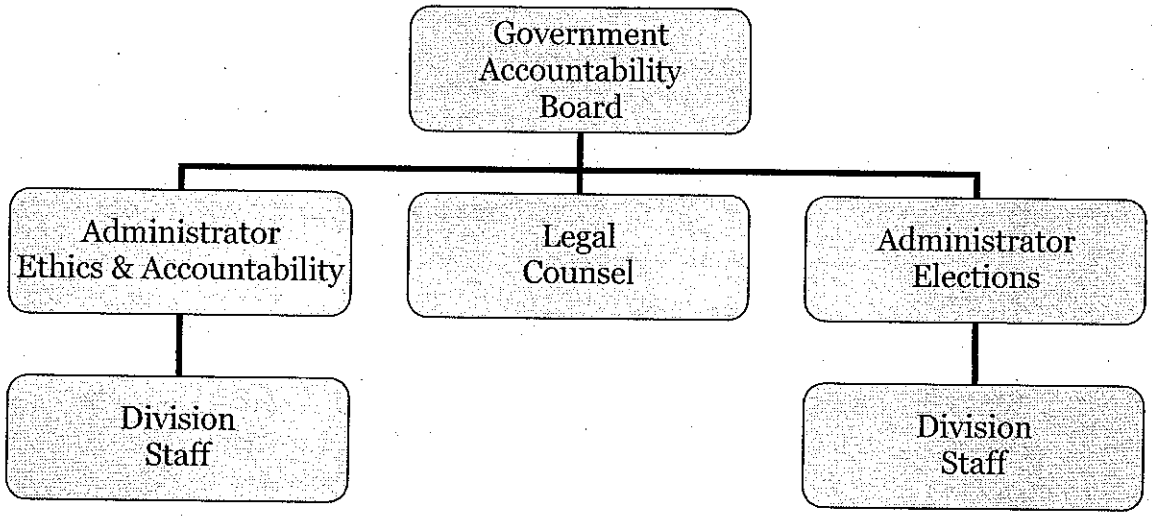
The Elections and Ethics Boards continue to function until the Government Accountability Board has hired three key staff (Legal Counsel, Ethics and Elections Administrators); therefore, all immediate substantive issues can be resolved by the existing boards while you get organized. In light of this, I have asked Kevin Kennedy and Roth Judd to report to you about the amount of rules and policies that will need to be reviewed in your first year. These brief reports will hopefully provide you with an idea of the first year's work load.

The final topic on the agenda is staff recruitment and organizational structure. 2007 Wisconsin Act 1 provides only the basics and leaves much of the detail to the Board. Enclosed is a memo from Legislative Council Chief of Legal Services, Don Dyke, that summarizes the provisions regarding the Legal Counsel. At the Board meeting, discussion should address requirements for the position in the areas of: education, legal experience, management experience, oral and written skills, etc. The result of this discussion will guide the creation of the position description that will be used in job announcements.

The Board will also need to consider how you envision the organizational chart. The two obvious examples are the conventional hierarchical structure:



The second variation is a flat structure:



Discussion of these two models along with any other variation should lead to staff directives for the next meeting. In addition, representatives from the Office of State Employee Relations and the Department of Administration will attend the next meeting to assist in preparing for the position recruitment.

Since the two boards do not merge and the clock does not start to measure the year of rule and policy review until all three positions are filled, there is considerable merit in first recruiting and selecting the Legal Counsel and then have that employee's involvement in the selection of the two division administrators, as well as the organization of the office prior to the commencement of the review.

I look forward to seeing you next Thursday. If you require additional information prior to that time, please let me know.

TCA:wu

Enclosures

GOVERNMENT ACCOUNTABILITY BOARD

Agenda
August 23, 2007
Legislative Council Conference Room

10:00 a.m.*	Convene Sign Oaths Select Chair
10:15 a.m.	Call to Order Determination of Quorum Introductions and Opening Remarks
10:30 a.m.	Overview of Act 1 Don Dyke and Ron Sklansky, Senior Staff Attorneys Legislative Council
10:45 a.m.	Overview of Open Meetings and Records Laws Ron Sklansky, Senior Staff Attorney, Legislative Council
11:00 a.m.	Other States' Experiences Carlos Montoya, Legislative Council Legal Intern
11:15 a.m.	Overview of Elections Board Rules and Policies Kevin Kennedy
11:35 a.m.	Overview of Ethics Board Rules and Policies Roth Judd
12:00 Noon	Lunch Recess
1:00 p.m.	Reconvene Board Discussion of Qualifications and Duties of Legal Counsel and Staff Organizational Structure
2:00 p.m.	Board Directives for Next Meeting
2:30 p.m.	Adjournment

* All of the times listed in the agenda are approximations.

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Wisconsin Legislative Council

By:
Ronald Sklansky
Senior Staff Attorney

Responding to Open Records Requests

Much of the material in a legislator's office or kept by a legislator qualifies as a public "record" under Wisconsin's Open Records Law [ss. 19.31 to 19.39, Stats.]. This material is required to be available for inspection and copying by the public, including the news media.

As an example, correspondence from and to a constituent is a public record and generally is open to inspection. Although personal correspondence between individuals is usually thought to be private, legislators are public officials and correspondence with them is public, unless the Open Records Law provides a reason to deny access.

The general rule under the Open Records Law is that all records held by a legislator are open to the public unless a specific provision in the law allows the records to be kept confidential. This rule embodies the public policy of the state that all persons should have the greatest possible information about the decisions and activities of state and local government. In practice, very few requests to inspect or copy records are denied.

The purpose of this document is to set forth the steps a legislator may take to deal with a request to inspect records.

A decision to deny access to a record should be made very carefully, since it most likely will be challenged--in court, in the news media, or in partisan debate.

Legislators are strongly advised, prior to responding to a request to inspect records, to seek additional advice beyond that set out below. Legislative leaders can provide pragmatic and political advice. Legislative Council staff can provide procedural advice.

Not only are decisions to deny access to records legally and politically sensitive, but the law on public records is complex and difficult to apply in specific instances. This document describes the statutes that constitute the Open Records Law. In addition to the statutes, the Wisconsin courts have interpreted and applied the Open Records Law in a number of

cases. The statutes and cases constitute the legal basis for decisions to release or deny access to records.

The Open Records Law and the court cases are technical and do not provide a straightforward guide to decisions on record requests. This document describes the statute in plain language, but even this document cannot fully guide a legislator's decisions in the variety of situations that may arise.

Clarify, in Advance, Who Is the "Custodian" of the Office's Records

*The **custodian** is the person who responds to a request to inspect records.*

The custodian is the person who responds to a request to inspect records. Each legislator is automatically the custodian of his or her records, unless an office staff member is designated as custodian. A legislator and his or her staff should have a clear understanding of who makes the decisions when responding to a request to inspect records.

In most cases, it appears preferable that a legislator retain the role of custodian of his or her records, since the legislator is the person directly affected by an inappropriate release of records. Note, however, that in the event that a request is made during a period of time that a legislator is unavailable (e.g., a vacation), action on the request will be delayed. The law makes no provision for appointment of a temporary custodian under such circumstances.

Respond Reasonably Promptly to a Request

A response must be made "as soon as practicable and without delay."

A response to a record request must be made "as soon as practicable and without delay" under the law. In practical terms, a custodian may need some amount of time to retrieve and inspect the record before formulating a response.

The response to a request for a record is either: (1) to provide the record; or (2) to deny the request. If a written request is denied, the reasons for the denial must be given in writing.

Respond to a Request in Kind

If the request is made orally, and is going to be denied, the denial may be made orally. If a requester who was orally denied a request later demands a written statement of denial, and the demand is made within five business days of the oral denial, the written statement must be provided.

If a request is made in writing, the response must be in writing giving the reasons for the denial. Written responses to written requests must include this statement--"This denial is subject to review by mandamus under s. 19.37 (1), Stats., or by application to the Attorney General or a district attorney."

Demand That a Request Be Reasonably Specific

There is no blanket exemption for constituent mail--in most cases, it is a "record."

A request must be honored if it "reasonably describes the requested record or the information requested." However, requests to go through an office's files (a "fishing expedition") do not have to be honored.

For example, requests such as the following must be given a response: "All constituent mail on Assembly Bill 000"; "the mailing list for your newsletter distribution"; "all correspondence on the Highway XO project in your district."

Also, there is no blanket exemption for constituent mail--in most cases, it is a "record."

Seeking Identity of Requester; Purpose of Request

A record request may not be denied because the requester refuses to provide identification or to state the purpose of the request. However, if the record is at a private residence, or valid security reasons exist, a requester may be required to show acceptable identification. Also, if it is known that a person making a record request is an incarcerated person or a person committed to an inpatient treatment facility, a legislator is under no obligation to respond to the request, unless:

- The record contains specific references to the person or to his or her minor children to whom he or she has not been denied physical placement; and
- The record is otherwise accessible to the person by law.

Decide if the Requested Material Is a "Record"

A record is any material which bears information, regardless of form ("written, drawn, printed, spoken, visual, or electromagnetic information") and which was created or is being kept by a custodian, except any of the following:

- Personal property of the legislator that has no relation to his or her office of legislator.
- Drafts, notes, preliminary computations, and similar material prepared for the personal use of the legislator or prepared in the name of a legislator by a member of his or her staff.
- Material to which access is limited by copyright, patent, or bequest.
- Published materials that are available for sale or are available at a public library.

If the requested material falls into one of the above exceptions, it is not a "record" and the request may be denied for that reason.

Make a Decision on the Request

It is the public policy of the state that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of public officers and employees. **The law is to be construed with a presumption of complete public access, consistent with the conduct of governmental business.** The denial of public access generally is contrary to the public interest. Access may be denied only in exceptional cases--that is, under specific statutory or common law exemptions and in cases where it can be demonstrated that the harm done to the public interest by disclosure outweighs the right of access to public records.

If a record requester appears in person, a legislator may permit the person to photocopy the record or provide the person with a copy substantially as readable as the original. Similar provisions apply to records in an audio, video, photographic, or computer format. The legislator must provide a record requester with facilities comparable to those used by employees to inspect, copy, and abstract the record during established office hours. However, the legislator is not required to purchase new equipment or provide a separate room for a record requester.

If a legislator decides to provide access to a record, a person identified in the record must be given an opportunity to seek judicial review of the decision prior to release of the record if any of the following apply:

- The record is the result of an investigation into an employee disciplinary matter.
- The record is obtained through a subpoena or search warrant.
- The record is prepared by an independent contractor and it contains information relating to an employee of the independent contractor.

However, in the case of any record containing information identifying a state or local public official, a legislator, prior to the release of the record, must provide the official with an opportunity to augment the record with written comments and documentation.

Denial of a Request

Legislative Council staff can advise a legislator of the exemptions to the Open Records Law.

In some instances, access to records may be denied. However, any written denial must specifically cite a statutory or common law exemption or demonstrate that there is a need to restrict public access at the time that the request is made.

The exemptions to the Open Meetings Law are used as a guide for denial. The applicable exemptions in that law are:

- "Deliberating concerning a case which was the subject of any judicial or quasi-judicial trial or hearing before that governmental body."
- "Considering dismissal, demotion, licensing or discipline of any public employe or person licensed by a public body or the investigation of charges against such person . . . and the taking of formal action on any such matter . . . ."
- "Considering employment, promotion, compensation or performance evaluation data of any public employe over which the governmental body has jurisdiction or exercises responsibility."

- "Deliberating or negotiating the purchasing of public properties, the investing of public funds or conducting other specific public business, whenever competitive or bargaining reasons require a closed session."

- "Considering financial, medical, social or personal histories or disciplinary data of specific persons, preliminary consideration of specific personnel problems or the investigation of charges against specific persons . . . which, if discussed in public, would be likely to have a substantial adverse effect on the reputation of any person referred to in such histories or data, or involved in such problems or investigations."

- "Conferring with legal counsel for the governmental body who is rendering oral or written advice concerning strategy to be adopted by the body with respect to litigation in which it is or is likely to become involved."

- "Consideration of requests for confidential written advice from the ethics board under s. 19.46 (2), or from any county or municipal ethics board."

- "Considering any and all matters related to acts by businesses under s. 560.15 (economic adjustment program where a business is shutting down or laying off employes) which, if discussed in public, could adversely affect the business, its employes or former employes."

(In addition to the above, meetings can also be closed to discuss probation or parole applications, crime fighting strategy, burial sites, state ice rink operation, and certain Unemployment Insurance Advisory Council and Worker's Compensation Advisory Council matters. In specific situations, these less-common grounds may be applicable to a record request made to a legislator.)

The Wisconsin Supreme Court has stated that access to information collected under a pledge of confidentiality, where the pledge was necessary to obtain the information, may be denied. The Open Records Law also exempts records from access if: (1) federal or state law requires nondisclosure; (2) the record is a computer program; (3) the record is a trade secret; or (4) the record contains specified personal information regarding an employee. Other statutory and common law exemptions exist--a legislator can be advised of the exemptions to the Open Records Law by Legislative Council staff.

Partial Denial

If part of a record qualifies for confidential treatment, the remainder must be released. In those instances, a legislator should either separate the confidential information, or delete it and release the remainder.

Provide Copies on Request

Persons having a right to inspect a record are entitled to a copy, if they ask for it. The custodian should copy the record in order to retain control over the original record. A fee for copying, which does not exceed the actual copying cost, may be charged based on per copy charges established by the Chief Clerk in each house. A search fee also may be imposed, but only if the cost of the search is $50 or more.

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Wisconsin Legislative Council

By:
Richard Sweet
Senior Staff Attorney

Open Meetings Law

The Open Meetings Law was created in 1959 and revised substantially in 1976. The law requires that meetings of governmental bodies be conducted in open session, with certain exceptions, and be preceded by a notice of the meeting. The law is set forth in ss. 19.81 to 19.98, Stats.

*Generally, the law requires that meetings of governmental bodies be conducted in **open session**, with certain exceptions, and be preceded by a **notice** of the meeting.*

Purpose

The Open Meetings Law contains a **declaration of policy**. This declaration, which was part of the original statute in 1959, makes the following statements:

- Representative government of the American type is dependent upon an informed electorate.
- It is the policy of this state that the public is entitled to the fullest and most complete information regarding governmental affairs as is compatible with the conduct of governmental business.
- All meetings of state and local governmental bodies must be publicly held in places reasonably accessible to the public and must be open to all citizens at all times, except where otherwise expressly provided by law.

The Open Meetings Law further states that it is to be liberally construed in order to achieve its purposes.

Definitions

The applicability of the Open Meetings Law is determined by the definitions of "governmental body," "meeting," and "open session." Although these definitions are somewhat technical, the clear effect of the definitions is to apply the Open Meetings Law broadly. The definitions of these terms are as follows:

- "**Governmental body**": A state or local agency, board, commission, committee, council, department, or public body corporate and politic created by constitution, statute, ordinance, rule, or order; a governmental or quasi-governmental corporation (except for the Bradley Center Sports and Entertainment Corporation); a local exposition district; a family care district; or a nonprofit corporation operating the state ice rink. The term includes a formally constituted subunit of any of these bodies. The term excludes a body or subunit that is formed for or meeting for the purpose of public employee collective bargaining.

- "**Meeting**": The convening of members of a governmental body for the purpose of exercising the responsibilities, authority, power, or duties delegated to or vested in the body. The definition creates a rebuttable presumption that if 1/2 or more of the members of a governmental body are present, the meeting is presumed to be for the purpose of exercising the powers vested in that governmental body. The definition excludes any social or chance gathering or conference that is not intended to avoid the Open Meetings Law. In addition, the definition excludes gatherings of members of a town board, town sanitary district, or drainage board, for certain inspections; different procedural requirements apply to these inspections.

- "**Open session**": A meeting that is held in a place that is reasonably accessible to members of the public and open to all citizens at all times. In the case of a state governmental body, it means a meeting that is held in a building and room that enables access by persons with physical disabilities.

Requirements of the Law

Open Session Required

Every meeting of a governmental body must be held in open session and all discussions held at a governmental body meeting, and all action, whether formal or informal, must be initiated, deliberated upon, and acted upon in open session, except as specifically exempted by statute.

The applicability of the Open Meetings Law to a gathering of less than 1/2 of the members of a governmental body was addressed by the Wisconsin Supreme Court in *State ex rel. Newspapers, Inc. v. Showers*, 135 Wis. 2d 77, 398 N.W.2d 154 (1987). *Showers* involved an unannounced, private meeting of four members of the 11-member Milwaukee Metropolitan Sewerage Commission. The subject of the meeting was the Commission's proposed operating and capital budgets. Adoption of these budgets required a 2/3rds vote of the Commission (i.e., eight votes).

In ruling that the requirements of the Open Meetings Law applied to meetings of "negative quorums" (i.e., a sufficient number of members to block action by the governmental body), the court provided a two-part test to determine when a gathering of less than 1/2 of the members of a governmental body triggers the Open Meetings Law. Under the test, such a meeting is subject to the law if: (1) the members have convened for the purpose of engaging in governmental business, whether discussion, decision-making, or information gathering; and (2) the number of members present is sufficient to determine the governmental body's course of action on the subject under discussion.

Notice Requirements

Public notice of meetings of governmental bodies must be in the manner required by any other statutes and by the body's chief presiding officer or a designee communicating notice to the public, to news media that have filed a written request for notice, and to the governmental body's official newspaper. If no official newspaper exists, notice must be communicated to a news medium likely to give notice in the area.

*Notice must be given **at least 24 hours** before the commencement of the meeting. If there is good cause why a 24-hour notice is impossible or impractical, a shorter notice may be given; however, in no case may notice be provided less than **two hours** before the meeting.*

The meeting notice must specify each meeting's time, date, place, and subject matter. Notice must be given **at least 24 hours** before the commencement of the meeting. If there is good cause why a 24-hour notice is impossible or impractical, a shorter notice may be given; however, in no case may notice be provided less than **two hours** before the meeting.

Departments and subunits of the University of Wisconsin System and nonprofit organizations that operate the ice rink owned by the state are exempt from the specific public notice requirements set forth above. These entities must, however, still provide notice reasonably likely to inform interested persons, as well as news media that have filed written requests for notice.

A subunit of a governmental body (such as a subcommittee) may conduct a meeting during a lawful meeting of its parent body, during the meeting's recess, or immediately after the parent body meets, for the purpose of discussing or acting on a subject that is also the subject of the meeting of the parent body, without the required public notice. However, the parent body's presiding officer must publicly announce the time, place, and subject matter of the subunit's meeting in advance at the parent body's meeting.

Exemptions From Open Session

A meeting of a governmental body may be convened in closed session only for specific enumerated purposes.

A meeting of a governmental body may be convened in closed session only for specific enumerated purposes. These purposes are:

- Deliberating concerning a case that was the subject of any judicial or quasi-judicial trial or hearing before the particular governmental body.
- Considering dismissal, demotion, licensing, or discipline of any public employee or person licensed by a board or commission or the investigation of charges against such a person or considering the grant or denial of tenure for a university faculty member and taking formal action on any such matter. Under the law, the affected public employee, licensed person, or faculty member must receive actual notice of any evidentiary hearing preceding a final action and of any meeting at which final action may be taken. The notice must state that the person has a right to demand that the evidentiary hearing or meeting be held in open session.
- Considering employment, promotion, compensation, or performance evaluation data of any public employee over which the governmental body has jurisdiction or exercises responsibility.
- Considering specific probation, extended supervision, or parole applications or considering strategy for crime detection or prevention.
- Deliberating or negotiating purchasing of public properties, investing public funds, or conducting other specified public business, if competitive or bargaining reasons require a closed session.
- Deliberating by the Council on Unemployment Compensation or the Council on Worker's Compensation in a meeting at which all employer members of the Council or all employee members of the Council have been excluded.
- Deliberating the preservation of burial sites if the location of a burial site is a subject of the meeting and if discussing the location in public would be likely to result in disturbance of the burial site.
- Considering financial, medical, social, or personal histories or disciplinary data of specific persons, preliminary consideration of specific personnel problems or

the investigation of charges against specific persons, in which public discussion would likely have a substantial adverse effect on the reputation of any person referred to in the histories or data, or involved in the problems or investigations.

- Conferring with the governmental body's legal counsel who is rendering oral or written advice concerning strategy to be adopted regarding litigation in which the body is or is likely to become involved.

- Considering a request for confidential written advice from the Ethics Board or from any local government ethics board.

- Considering matters related to acts by businesses under the state's "Economic Adjustment Program," in which public discussion could adversely affect the business, its employees, or its former employees.

- Considering financial information that relates to the support by a person (other than a governmental authority) of a nonprofit corporation operating the Olympic Ice Training Center.

Closed Session Procedure

The Open Meetings Law establishes a procedure that must be followed when a meeting of a governmental body goes into closed session. The requirements are:

- The chief presiding officer of the governmental body must announce to those present at the meeting the nature of the business to be considered in the closed session and the specific exemption under which the closed session is claimed to be authorized. The announcement must be made part of the record of the meeting.

- A motion to convene in closed session must be made and adopted by majority vote. The vote must be conducted in such a manner that each member's vote is ascertained and recorded in the meeting's minutes.

- The business to be taken up at the closed session is limited to the matters contained in the presiding officer's announcement of the closed session.

- A governmental body may not commence a meeting, subsequently convene in closed session, and thereafter reconvene in open session within 12 hours after completing the closed session, unless public notice of the subsequent open session was given at the same time and in the same manner as the public notice of the meeting held prior to the closed session.

- A governmental body may not consider the final ratification or approval of a public employee collective bargaining agreement at a closed meeting.

Legislative Meetings

The Open Meetings Law is applicable to the Legislature as follows:

- Senate and Assembly meetings and meetings of committees, subcommittees, and other subunits must comply with the Open Meetings Law, except that meetings called solely to schedule business before a legislative body do not have to comply with the public notice requirements of the law.

- If a provision of the Open Meetings Law conflicts with a Senate or Assembly rule or a joint rule of the Legislature, and the legislative meeting is conducted in compliance with that rule, that provision of the Open Meetings Law will not apply.

- The Open Meetings Law does not apply to any partisan caucus of the Senate or Assembly, except as provided by legislative rule.

- The Senate or Assembly Committee on Organization may vote to examine tax returns only if the tax returns are disclosed to the committee in a closed meeting.

Voting

Unless otherwise specifically provided by statute, a secret ballot may not be used to determine elections or the decisions of a governmental body, except for the election of officers. A member of a governmental body may require that each member's vote on any question be ascertained and recorded, other than a vote for election of officers. Motions and roll call votes of each governmental body meeting must be recorded, preserved, and open to public inspection as required by the Open Records Law.

Other Requirements

A duly elected or appointed member of a governmental body may not be excluded from any meeting of that body. Likewise, a member of a governmental body may not be excluded from any meeting of a subunit of that body, unless the body's rules provide otherwise.

A governmental body holding a meeting in open session must make a reasonable effort to accommodate anyone who wishes to record, film, or photograph the meeting, unless these activities interfere with the conduct of the meeting or the rights of the participants.

Any person may request advice from the Attorney General as to how the Open Meetings Law applies under any circumstances.

Penalties; Enforcement

Penalties

Any member of a governmental body knowingly attending a meeting of the body held in violation of the Open Meetings Law, or, in his or her official capacity, violating the law by some act or omission, is subject to a nonreimbursable forfeiture of not less than $25 nor more than $300 for each violation.

A member of a governmental body is not liable for his or her attendance at a meeting held in violation of the law if the person makes or votes in favor of a motion to prevent the violation from occurring, or his or her votes on any relevant motions prior to the violation are inconsistent with the circumstances causing the violation.

Enforcement

The Open Meetings Law is enforced by the Attorney General in the name and on behalf of the state or by the district attorney of any county where a violation may occur on the complaint of any person. Any forfeitures recovered, together with reasonable costs, are awarded to the state in actions brought by the Attorney General and to the county in actions brought by a district attorney. In addition, the Attorney General or district attorney may commence an action, separately or in conjunction with a forfeiture action, to obtain other appropriate legal or equitable relief including, but not limited to, mandamus, injunction, or declaratory judgment.

Action taken at a meeting of a governmental body held in violation of the Open Meetings Law is voidable upon a lawsuit brought by the Attorney General or the district attorney of the county where the violation occurred. However, the court may hold the action void only if it finds that, under the facts of the particular case, the public interest in enforcing the Open Meetings Law outweighs any public interest in sustaining the validity of the action taken at the meeting.

If a district attorney refuses or fails to begin a lawsuit to enforce the Open Meetings Law within 20 days after receiving a verified complaint, the person making the complaint may commence a lawsuit in the name and on behalf of the state. The court may award actual and necessary costs of prosecution, including reasonable attorney fees, to the person who commenced the lawsuit if he or she prevails. However, any forfeiture imposed is paid to the state.

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GOVERNMENT ACCOUNTABILITY BOARD

TO: MEMBERS, GOVERNMENT ACCOUNTABILITY BOARD

FROM: Carlos Montoya, Intern

RE: Ethics, Election, and Lobbying Boards of Surrounding States

DATE: August 16, 2007

This memorandum compares member selection, jurisdiction and powers of election, ethics, and lobbying boards in Illinois, Indiana, Iowa, Michigan, and Minnesota.

OVERVIEW

Currently, Illinois, Indiana, Iowa, Michigan, and Minnesota do not integrate elections, ethics, and lobbying administration into one authority. Most often, surrounding states continue to separate election, ethics, and lobbying oversight into separate commissions. For example, oversight of election law in Illinois and Indiana is the responsibility of a bipartisan election board. [10 ILCS 5/10-6.2, Stats.; Indiana s. 3-6-4.1, Stats.] However, campaign finance and lobbying oversight in Indiana is the specific responsibility of the Indiana Lobby Registration Commission. [Indiana ss. 2-7-1.6-1, Stats.] In Iowa, Michigan, and Minnesota, election oversight power is generally prescribed to an elected Secretary of State designated as the state's chief elections officer. [Iowa s. 47.1, Stats.; Michigan ss. 168.31-168.37, Stats.; Minnesota ss. 200-211, Stats.] In these three states, some specific election powers are delegated to state boards. [*See* Iowa ss. 47.7, 47.8, 50.37, and 52.4, Stats.; Michigan Constitution Art. II, s. 7; Minnesota ss. 200-211, Stats.] Additionally, Minnesota administers and enforces campaign finance and lobbying through a state board. [Minnesota s. 10A, Stats.]

In general, oversight of ethics laws in Iowa, Indiana, and Michigan are the jurisdiction of one ethics commission. [*See* Indiana s. 4-2-6, Stats.; Iowa s. 69.16, Stats.] Minnesota has no statewide ethics board and mostly governs the conduct of elected officials and state employees through legislative rules and laws. Illinois is the only surrounding state that divides ethics oversight into multiple commissions. [*See* 5 ILCS 430, Stats.; Illinois Executive Order No. 3, 2003.]

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1. Membership Composition

a. Election Boards

Two election boards have a structure similar to Wisconsin's Government Accountability Board. The Illinois State Board of Elections is comprised of eight bipartisan members appointed by the Governor to four-year terms. [10 ILCS 5/10-6.2, Stats.] The Indiana Election Division is comprised of two co-directors nominated by the state party chairs and appointed by the Governor to a four-year term. [Indiana s. 3-6-4.1, Stats.] In Iowa, Minnesota, and Michigan, an elected Secretary of State is the chief elections officer. The Secretary of State of Iowa is the State Commissioner of Election. [Iowa s. 47.1, Stats.] Four entities, the Voter Registration Commission (comprised of the Secretary of State, the State Chairperson of each of the two major parties, and a person appointed by the President of the County Auditors Association), the Registrar of Voters, the Board of Canvassers (comprised of the Governor, Secretary of State, State Auditor, State Treasurer, and Secretary of Agriculture), and the Board of Examiners for Voting Machines and Electronic Voting Systems (a three-member board appointed by the State Commissioner of Elections for six-year terms) are also responsible for administering portions of election law. [Iowa ss. 47.7, 47.8, 50.37, 52.4, Stats.] In Minnesota, the Secretary of State chairs the State Election Canvassing Board. The board is comprised of the Secretary of State, two Justices of the State Supreme Court and two Judges of the District Court. [Minnesota ss. 200-211, Stats.] The Secretary of State in Michigan selects and supervises the director of the Bureau of Elections [Michigan ss. 168.31-37, Stats.] The Michigan Board of State Canvassers is a four-member bipartisan board appointed by the Governor with the consent of the Senate to four-year terms. [Michigan Constitution Art. II, s. 7.]

b. Ethics Boards

The ethics boards of Indiana, Iowa, and Michigan each use one commission to administer ethics functions. Each board balances political affiliation of board members and imposes rules that limit conflicts of interest. The five-member Indiana State Ethics Commission is appointed by the Governor to four-year terms. [Indiana ss. 2-7-1.6-1, Stats.] The Governor designates one member of the Commission as the chairperson. [*Id.*] The six-member Iowa Ethics and Campaign Disclosure Board is appointed by the Governor to six-year staggered terms and is subject to Senate confirmation. [Iowa s. 69.16, Stats.] The seven-member Michigan State Board of Ethics is comprised of Michigan residents who are appointed by the Governor with the advice and consent of the State Senate to staggered four-year terms. [Michigan s. 15.341, Stats.]

Two commissions oversee ethics laws in Illinois. The nine-member Executive Ethics Commission (comprised of one ethics director, corporate counsel, associate dean, private consultant, registered nurse, and two clergy members and private attorneys) is appointed as follows: the Governor appoints five commissioners and the Attorney General, Secretary of State, Comptroller and Treasurer each appoints one commissioner. [Illinois s. 5 ILCS 430/1, Stats.] Additionally, the Governor, the Attorney General, the Secretary of State, the Comptroller, and the Treasurer each appoint one of five Executive Inspector Generals. [Illinois Executive Order No. 3, 2003.] The eight-member Illinois Legislative Ethics Commission is appointed as follows: the President and Minority Leader of the Senate and the Speaker and Minority Leader of the House of Representatives each appoint two commissioners to four-year

terms. [Illinois s. 5 ILCS 430, Stats.] The Legislative Inspector General is appointed by a joint resolution of the Senate and the House of Representatives. [*Id.*]

c. Lobbying Boards

The Indiana Lobby Registration Commission is comprised of four members appointed by the President Pro Tempore of the Senate, the Minority Floor Leader of the Senate, the Speaker of the House of Representatives, and the Minority Floor Leader of the House of Representatives, each appoints one member. [Indiana Code ss. 2-7-1.6-1, Stats.] Of those appointments, not more than two of the four members may hold the same political affiliation. [*Id.*] The commission is a separate and independent agency within the legislative branch of state government.

The Minnesota Campaign Finance and Public Disclosure Board is comprised of six members, appointed by the Governor on a bipartisan basis to staggered four-year terms. [Minnesota s. 10A, Stats.] The appointments must be confirmed by a 3/5 vote of the members of each house of the Legislature. [*Id.*] Members or employees of the board are not permitted to be candidates for, or hold, a national, state, congressional district, legislative district, county, or precinct office in a political party. [*Id.*]

2. Jurisdiction and Powers

a. Election Boards

The Illinois State Board of Elections supervises the administration of election laws. [Illinois s. 10 ILCS 5/10-6.2, Stats.] The board's duties include: providing uniform instructions to election judges, preparing and certifying ballots for proposed amendments to the state constitution or any referenda, prescribing forms, notices, and other supplies used for registrations and elections, operating as the filing office for nominating petitions, certifying ballots for all federal, state, and multi-county (multi-jurisdictional) offices, serving as the electoral board for objections to petitions for multi-jurisdictional and statewide referenda, and acting as the canvass board for multi-jurisdictional offices and statewide propositions. [*Id.*]

The Indiana Election Division prepares paper ballots for statewide elections and voter registration material. [Indiana s. 3-6-4.1, Stats.] Additionally, the division trains and supervises local election officials, canvasses county returns in general elections, approves voting machines in advance, and canvasses election returns in primary and general elections. [*Id.*]

Election power in Iowa is balanced across several offices and commissions. The Secretary of State serves as the State Commissioner of Elections. [Iowa s. 47.1, Stats.] The Secretary prescribes necessary forms required to conduct elections and exercises general supervisory powers over county commissioners of election. [*Id.*] The Voter Registration Commission is responsible for creating and reviewing policy regarding voter registration and must prescribe forms required for voter registration. [Iowa s. 47.8, Stats.] The State Registrar regulates the preparation, preservation, and maintenance of voter registration records. [Iowa s. 47.7, Stats.] The Board of Canvassers must canvass abstracts of votes cast for all state and federal offices, except Governor and Lieutenant Governor. [Iowa s. 50.37, Stats.] The Iowa

Board of Examiners for Voting Machines and Electronic Voting Systems is responsible for final approval of all voting machines before use. [Iowa s. 52.4, Stats.]

Michigan's Secretary of State is the chief election officer and has supervisory control over local election officials. [Michigan ss. 168.31-168.37, 4.424, Stats.] The Secretary's duties and powers include: publishing and distributing instruction manuals; prescribing uniform notices, forms, supplies, and ballots; reporting violations of election law to the Attorney General; and investigating lobbying violations. [*Id.*] The Board of State Canvassers duties include: canvassing petitions filed by candidates seeking federal and state offices, minor parties, and groups that wish to place proposals on the statewide ballot; arranging the ballot wording of the proposals; certifying the result of elections held statewide and in districts that cross county line; approving all voting systems in advance; and conducting recounts. [*Id.*]

The Minnesota Secretary of State serves as the chief election official and prescribes ballot forms, provides copies of state election law and guides to county auditors, and approves all voting machines in advance. [Minnesota ss. 200-211, Stats.] The Canvassing Board is responsible for conducting the primary and general election canvass for all state and federal offices and declaring results of the canvass. [*Id.*]

b. Ethics Boards

Generally, state ethics boards have jurisdiction over elected officials, officers, and state employees. Moreover, the state boards enforce state ethics acts.

Illinois divides ethics law oversight authority into two commissions. [*See* Illinois s. 5 ILCS 430, Stats.; Illinois Executive Order No. 3, 2003.] The Legislative Ethics Commission has jurisdiction over members of the general assembly and state employees. [Illinois s. 5 ILCS 430, Stats.] The commission's duties and powers include: preparing and publishing ethics manuals and guides, training employees under its jurisdiction; preparing public information materials to facilitate compliance with ethics law; conducting administrative hearings; ruling on matters brought before the commission by the Legislative Inspector General; issuing recommendations and imposing administrative fines to parties under the commission's jurisdiction; and issuing subpoenas to compel the attendance of witnesses in matters pending before the commission. [*Id.*] The Executive Ethics Commission oversees employees and officers that are responsible to the Governor. [*Id.*] The commission's duties and powers are similar to the Legislative Ethics Commission, although the Executive Ethics Commission only has jurisdiction over the executive branch officers and employees. [*See Id.*] Furthermore, under certain circumstances, the commission may appoint a Special Executive Inspector General to investigate alleged misconduct. [Illinois Executive Order No. 3, 2003.]

The Indiana State Ethics Commission is authorized to initiate and conduct investigations of alleged violations upon its own initiative or by request of the Governor. [Indiana s. 4-2-6, Stats.] Other commission duties and powers include: receiving sworn complaints of alleged ethics violations; forwarding complaints to more appropriate authorities for investigation; making recommendations to the appointing authority to reprimand, suspend, or dismiss an employee under the commission's jurisdiction; directly imposing sanctions of a civil penalty, canceling a contract, or barring a person from contracting with an agency of state government;

permitting respondents to enter into a settlement, administering financial disclosure provisions; and interpreting ethics rules (any statute or rule governing official conduct) through advisory opinions issued upon request of an appointing authority or under the commission's own motion (an advisory opinion is binding on the commission in any subsequent allegations concerning the person who requested the opinion and who acted on it in good faith). [*Id.*]

The Iowa Ethics and Campaign Disclosure Board is responsible for administering campaign and ethics laws. [Iowa s. 69.16, Stats.] The board has jurisdiction over candidates for statewide office, officials, and employees of the executive branch of state government. [*Id.*] The board's powers and duties include: receiving reports regarding dual compensation, consenting to sales/leases by regulatory agencies and the Governor; providing advice; and enforcing violations of the law relating to gifts, conflicts of interest, and use of state resources; and providing advice to local government personnel concerning the application of the ethics laws. [*Id.*] Board advice, if followed, constitutes a defense to a complaint. [*Id.*] However, the board is not authorized to investigate complaints or impose sanctions against personnel. [*Id.*]

The Michigan Ethics Board's powers are primarily advisory and investigatory. The board is not empowered to take direct action against any person or agency. [Michigan s. 15.341, Stats.] Additionally, the board has jurisdiction over public officials and executive branch employees, but not over employees of the legislative and judicial branches of state government. [*Id.*] The Senate Government Operations Committee and House Constitutional Law and Ethics Committee have jurisdiction over the Legislature and judicial branches. The board's powers and duties include: receiving complaints concerning alleged unethical conduct by public officers or employees from any person or entity; conducting inquiries into allegations of unethical conduct; making recommendations concerning individual cases to the appointing authority with supervisory responsibility over the person whose activities has been investigated; initiating investigations of practices that could affect the ethical conduct of public officers or employees; holding public hearings; administering oaths and receiving sworn testimony; holding meetings and hearings in private when it appears necessary for the protection of individual rights; issuing and publishing advisory opinions upon request from a public officer or employee or their appointing or supervisory authority relating to matters affecting ethical conduct of a public officer or employee; and promulgating rules governing the board's procedures pursuant to state law. [*Id.*]

Minnesota is unique in that no state board has broad jurisdiction over ethics laws. The Minnesota Legislature self-governs the ethical behavior of its members through ethics rules and committees. [Minnesota Constitution, Art. IV, s. 7.] Ethical conduct of the State House and Senate in Minnesota Legislature are delineated by permanent legislative rules. [Minnesota Permanent Rules of the House, 6.10, Art. IX; Minnesota Permanent Rules of the Senate, 55-58.] The Legislative Auditor is responsible for enforcing the state code of ethics applicable to state employees. [Minnesota s. 3.978, Stats.]

c. Lobbying

In general, the election boards or chief election officers are responsible for administering, canvassing, and investigating election law violations. However, jurisdiction over campaign finance and lobbying differs between states. In Michigan, campaign finance and lobbying is the

responsibility of the Secretary of State. [Michigan s. 4.424, Stats.] In Minnesota, the Campaign Finance and Public Disclosure Board is responsible for oversight of campaign finance registration and disclosure, public subsidy administration, lobbyist registration and disclosure, and economic interest disclosure by public officials. [Minnesota s. 10A, Stats.] The Indiana Lobby Registration Commission is responsible for investigating lobbying violations and hearing complaints. [Indiana ss. 2-7-1.6-1, Stats.] Illinois law states that the Secretary of State is responsible for registering and reporting lobbying information. [Illinois s. 25 ILCS 170/1, Stats.; Illinois Admin. Code s. 560.200.] Iowa integrates lobbying and ethics oversight. The Iowa Ethics and Campaign Disclosure Board administers, advises, and seeks to enforce campaign finance and lobbying rules. [Iowa s. 69.16, Stats.]

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WISCONSIN LEGISLATIVE COUNCIL

Terry C. Anderson, Director
Laura D. Rose, Deputy Director

TO: TERRY ANDERSON, DIRECTOR

FROM: Don Dyke, Chief of Legal Services

RE: Government Accountability Board Legal Counsel

DATE: August 15, 2007

This memorandum identifies and summarizes provisions in 2007 Wisconsin Act 1, which creates the Government Accountability Board (GAB), that relate to the legal counsel to the GAB. The memorandum also briefly discusses the relationship of the legal counsel and the GAB's two division administrators in the GAB's organizational structure. References in this memorandum to Wisconsin statutes are to the 2005-06 Wisconsin statutes, as affected by 2007 Wisconsin Act 1.

DUTY TO HIRE LEGAL COUNSEL

The GAB is required to employ, outside the classified service, a legal counsel. Sections 5.05 (1m) and 230.08 (2) (on), Stats. The legal counsel position is assigned to executive salary group 6, which currently has an annual salary range of $84,733 to $131,337. Section 20.923 (4) (f) 3. j., Stats.

LEGAL COUNSEL QUALIFICATIONS

Although not expressly stated, it appears implicit in the functions and duties of the legal counsel to the GAB that the GAB be licensed to practice law in Wisconsin. See, generally, s. 757.30, Stats. (practice of law without a license).

Other provisions in Act 1 concerning the qualifications of the GAB's legal counsel are in the nature of limitations, largely to assure the nonpartisan nature of the position. These qualifications include:

- The legal counsel may not have served in or have been a candidate for a partisan state or local office. Section 5.05 (2m) (d) 1., Stats.

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- The legal counsel may not have been a lobbyist (as defined in s. 13.62 (11), Stats.). Section 5.05 (2m) (d) 1., Stats.

- The legal counsel may not, for 12 months prior to becoming employed by the GAB, have made a contribution to a candidate for a partisan state or local office. Section 5.05 (2m) (e), Stats.

- While employed by the GAB, the legal counsel may not become a candidate for a state office or a partisan local office. Section 5.05 (2m) (d) 2., Stats.

- The legal counsel, while employed by the GAB, may not make a contribution to a candidate for state or local office. Section 5.05 (2m) (e), Stats.

More generally, the legal counsel and all other employees of the GAB must be nonpartisan. Section 5.05 (4), Stats.

LEGAL COUNSEL DUTIES

Generally, the legal counsel to the GAB is to "perform legal and administrative functions for the board." Section 5.05 (1m), Stats.

In addition to general legal and administrative functions, Act 1 expressly authorizes the GAB to allow its legal counsel, subject to limitations the board deems appropriate, to:

- Issue informal advisory opinions on behalf of the board. Section 5.05 (6a), Stats.

- Commence or intervene in any civil action or proceeding for the purpose of enforcing the laws regulating the conduct of elections or election campaigns or ensuring their proper administration. Section 5.05 (1) (e) and (9), Stats.

- Exempt a polling place from accessibility requirements, exempt a municipality from the requirement to use voting machines or an electronic voting system, approve an electronic data recording system for maintaining poll lists, or authorize nonappointment of an individual who is nominated to serve as an election official. Section 5.05 (1) (e), Stats.

- Certify documents in the custody of the board. Section 5.09, Stats.

The board's legal counsel is also required to execute on behalf of the state a contract with any individual who is retained as special counsel by the GAB. Section 5.05 (2m) (c) 6. b., Stats. Finally, the legal counsel is required to: (1) call a meeting of the Government Accountability Candidate Committee when a vacancy on the GAB occurs; and (2) assist the Candidate Committee in the performance of its functions. Section 5.054, Stats.

RELATIONSHIP OF LEGAL COUNSEL TO DIVISION ADMINISTRATORS

Act 1 creates two divisions in the GAB: an ethics and accountability division and an elections division. Section 15.603, Stats. The ethics and accountability division has the responsibility for

administration of campaign finance laws, lobbying laws, and the Ethics Code. Section 5.05 (2s), Stats. The elections division has responsibility for the administration of election laws other than campaign financing. Section 5.05 (2w), Stats. Each division is under the direction and supervision of an administrator, appointed by the GAB outside the classified service. Sections 15.603 and 230.08 (2) (e) 4. h., Stats. The perceived importance to the GAB of the legal counsel and division administrator positions is underscored by the final transition of the current Ethics Board and Elections Board to the GAB occurring on the 31st day beginning **after** the date on which the GAB has given final approval to the hiring of its legal counsel and two division administrators. SECTION 209 (1) of 2007 Wisconsin Act 1.

It is noteworthy that Act 1 does not specify the hierarchical structure for the GAB's legal counsel and division administrators. This supports the position that the GAB may determine the relative position of the board's legal counsel vis-à-vis the division administrators.

Note, however, that more general language in ch. 15, Stats., structure of the executive branch, addresses the internal organization of independent agencies, such as the GAB. Under s. 15.02 (4), Stats., the head of an independent agency establishes the internal organization of the agency, subject to the approval of the Governor, and allocates and reallocates duties and functions not assigned by law to an officer or any subunit of the agency to promote economic and efficient administration and operation of the agency. The head of an independent agency may delegate and redelegate to any officer or employee of the agency any function invested by law in the agency head. The Governor may delegate the authority to approve selected organizational changes to the head of the independent agency. It appears that the general organizational issue under discussion does not require the approval or delegation of the Governor because a determination by the GAB of either a vertical or horizontal model for the legal counsel's relationship to the division administrators is arguably not inconsistent with statutory language.

If you have any questions or need additional information, please contact me directly.

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